No. 43034-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

TANNER Z. RUSSELL,

Respondent.

Appeal from the Superior Court of Washington for Lewis County
Case No. 11-1-00627-6

Appellant's Opening Brief

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2. The trial court erred by finding that once the container was removed from Russell's pocket any threat regarding the contents of the container was eliminated.

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II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. An officer may conduct a *Terry* protective frisk for weapons when the officer can point to specific and articulable facts that create an objective reasonable belief that that officer's safety is in danger. Did the trial court err when it determined that the officer's frisk of Russell was not reasonable and justified given facts and the totality of the circumstances in this case?

B. An officer is not required to take unnecessary risks in the performance of their official duties. Did the trial court err when it ruled that even if the frisk of Russell was justified, the opening of the case recovered from Russell's pocket was not justified because the risk to officer was eliminated at the time the case was in the officer's possession?

C. An officer may lawfully obtain consent from an individual to search an area or an item. Did the trial court err by not including within its Conclusions of Law that the removal and opening of the case were permissible because Officer Makein received Russell's consent to retrieve the case and open it?

D. Evidence that is lawfully obtained may be used against a defendant in a criminal prosecution. Did the trial court err in suppressing evidence, the contents of the case removed from Russell's pocket, which were lawfully obtained when

the officer opened the case and immediately recognized the contraband?

III. STATEMENT OF THE CASE

On August 28, 2011, around midnight, Officer Makein of the Centralia Police Department pulled over a vehicle for an equipment violation. RP 10, 12-13; CP 72.[1] The driver of the vehicle had a felony warrant for her arrest and was taken into custody. RP 11. The vehicle was also occupied by a passenger, Tanner Russell. RP 10. Officer Withrow, who arrived to assist Officer Makein, found out through statements of the driver that she and Russell were casing the area and planning on returning to steal a car. RP 11-13. The driver and Russell were found to be in possession of burglary tools. RP 11. Officer Makein asked Russell if he was in possession of any weapons and Russell stated he was not. RP 12. Officer Withrow, upon frisking Russell, discovered a small, loaded .22 caliber pistol in Russell's right front pants pocket. RP 13, 15, 34; Ex. 3, 4, 5. The gun could easily be concealed in the palm of a person's hand. RP 15.

On September 5, 2011, around 11:00 p.m., Officer Makein was on patrol in Centralia, Washington, when he saw a bicycle

[1] There are two verbatim report of proceedings. The report of proceedings from the 3.6 hearing held on 11-16-11 will be cited as RP. The report of proceedings from the 12-29-11 hearing will be cited as 2RP.

traveling without a headlamp, which was a traffic infraction. RP 8. Officer Makein also noticed the bicycle improperly traveled into the oncoming lane of traffic. RP 8. Officer Makein conducted a traffic stop on the bicyclist in the well-lit parking lot of an AM/PM. RP 26. Officer Makein was alone and there were not any civilian witnesses close by when he contacted the bicyclist. RP 9, 17, 46. Officer Makein immediately recognized the bicyclist was Russell. RP 9. Due to the circumstances of Officer Makein's August 28th encounter with Russell, where Russell lied about having a weapon and was found with a loaded firearm, Officer Makein was concerned for his safety. RP 16-17, 39-40.

Due to the concern for his safety, Officer Makein determined it was necessary to frisk Russell for weapons. RP 17. Officer Makein conducted a protective frisk and found in Russell's pocket a case that was about six inches long, four inches wide and two inches deep. RP 18. Officer Makein knew the case was not a firearm but due to the size of the weapon found on Russell eight days prior, was concerned the case held a weapon. RP 18: Ex. 2. To eliminate the threat of a weapon, Officer Makein removed the case from Russell's pocket and opened it up. RP 18-19. Inside the

case was a loaded syringe that was later found to contain methamphetamine. RP 19-21, Ex. 1, 2.

Russell, through his trial counsel, brought a motion to suppress the evidence obtained from the protective frisk. CP 4-8. The State filed a response to Russell's motion. CP 9-27. Russell filed a reply brief. CP 28-63. A suppression hearing was held on November 16, 2011. RP 1. The trial court ruled that the frisk was unreasonable and that even if the frisk was reasonable, the officer was not justified in opening the case to inspect the contents. RP 60-61; CP 75-76. The trial court suppressed the evidence which effectively terminated the State's case. RP 61; CP 76. The trial court entered written findings of fact and conclusions of law and order dismissing the State's case. CP 71-76. The State filed written objections to the findings of fact and conclusions of law. CP 70-73. The State timely appeals. CP 81-88.

The State will further supplement the facts as needed throughout its argument.

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IV. ARGUMENT

A. OFFICER MAKIEN'S FRISK OF RUSSELL WAS OBECTIVELY REASONABLE.

Probable cause is required to be established prior to the government obtaining a warrant to search. U.S. Const. amend IV. The general rule is that warrantless searches are considered per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2026, 29 L.Ed.2d 564 (1971). It is the State's burden to show that a warrantless search falls within an exception to this rule. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980), *citing Arkansas v. Sanders*, 448 U.S. 753, 759, 99 S.Ct. 2586, 2590, 61 L.Ed.2d 235 (1979). "The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigated stops." *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).[2]

1. Standard Of Review Regarding Finding Of Facts And Conclusions of Law.

Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647,

[2] *See, Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

870 P.2d 313 (1994). The facts are binding on appeal "[w]here there is substantial evidence in the record supporting the challenged facts." *Id.* Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted).

The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson,* 128 Wn. App. 179, 193, 114 P.3d 699 (2005). A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

2. The Initial Stop Of Russell Was Permissible Due To His Commission Of A Traffic Infraction.

The Washington State Constitution guarantees its citizens the right to not be disturbed in their private affairs except under the authority of the law. Const. art. I, § 7. People have a right to not

have government unreasonably intrude on one's private affairs. U.S. Const. amend IV. Article One, section seven, of the Washington State Constitution protects the privacy rights of the citizens of Washington State. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson,* 138 Wn.2d 343, 348, 979 P.2d 833 (1999). A warrantless "seizure is considered per se unconstitutional unless it falls within one of the exceptions to the warrant requirement." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citation omitted).

An officer may stop a vehicle for investigatory purposes upon reasonable suspicion that the driver has committed a traffic offense. *State v. Duncan*, 146 Wn.2d 166, 173-75, 43 P.3d 513 (2002), *citing Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Articulable suspicion that supports an investigatory stop is "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d

445 (1986). In *Duncan* the Court differentiated between traffic infractions and civil infractions. *State v. Duncan*, 146 Wn.2d at 174. The court held that due to the unique set of circumstances traffic violations create probable cause was not necessary and therefore the articulable suspicion standard from *Terry* was all that is required for an officer to make a lawful stop for a traffic violation. *Id.*

Centralia Police Officer Makein stopped Russell for riding his bicycle without a headlamp during hours of darkness and for improper lane travel. RP 7-10; CP 72. The trial court properly found that Officer Makein had a reasonable suspicion that Russell had committed two traffic infractions and therefore Makein's initial detention of Russell to enforce the traffic infractions was lawful. CP 75.

3. Officer Makein's Extension Of The Traffic Stop To Perform A Protective Frisk For Weapons Was Reasonable Given All The Facts And Circumstances.

A police officer should not be required to take unnecessary risks while performing his or her official duties. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). The strong governmental interest in protecting a police officer's safety is why the courts follow a reasonableness standard instead of a probable cause standard in regards to assessing to a protective frisk for weapons. *State v.*

Collins at 172-73. Therefore, the Fourth Amendment will be satisfied if the following three requirements are met: "(1) the initial stop must be legitimate; (2) a reasonable safety concern must exist to justify a protective frisk for weapons; and (3) the scope of the frisk must be limited to the protective purpose." *Id.* at 173, *citing Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

An officer is justified in performing a protective frisk for weapons when there is a reasonable safety concern. *State v. Collins*, 121 Wn.2d at 173. The officer must be able to point to "specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous." *Id.*, *citing Terry*, 392 U.S. at 21-24 (internal quotations omitted). The United States Supreme Court explained in *Terry* that an officer does not have to be one percent certain, stating:

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Terry, 392 U.S. at 27.[3] A court is reluctant to substitute its judgment for that of an officer out in the field. *State v. Collins*, 121 Wn.2d at 173 (citation omitted). The officer's suspicion must be founded; giving the court a basis from which it can determine that the protective frisk was not harassing or arbitrary. *Id.* (citation omitted).

In *Collins*, a traffic stop occurred in darkness by an officer and his partner. *State v. Collins,* 121 Wn.2d. at 170-71. The officer recognized Collins from an arrest on an unspecified felony warrant made approximately two months earlier. *Id.*at 171. During that prior arrest, the officer noticed a large amount of either .38 or .357 ammunition, a gun holster and handcuffs in the passenger compartment of the Collins's truck. *Id.* During the prior arrest the officer did not find a gun while searching the vehicle. *Id.* Upon recognizing Collins and recalling these facts, the officer ordered Collins out of the vehicle and conducted a brief pat-down frisk of Collins's outer clothing to search for weapons. *Id.* During the frisk, the officer discovered a hard object in Collins's left rear pocket. *Id.*

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[3] *Cf. Beck v. State of Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 226, 13 L.Ed.2d 142 (1964); *Brinegar v. United States,* 338 U.S. 160, 174—176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949); *Stacey v. Emery,* 97 U.S. 642, 645, 24 L.Ed. 1035 (1878).

While removing the unknown object, the officer discovered drugs. *Id.*

The Washington State Supreme Court held that the protective frisk of Collins was permissible under the circumstances. *State v. Collins*, 121 Wn.2d 174-77. The Court evaluated the reasonableness of the protective frisk by considering the timing of the stop, Collins's prior felony arrest and the presence of ammunition and holster in a vehicle associated with Collins during a prior felony arrest. *Id.* 174-76. The Court stated:

> The Court of Appeals properly recognized the significant impact information that an individual stopped might have a gun would have on a reasonably careful officer's assessment of the dangers involved in a stop. We hold that, when combined with other circumstances that contribute to a reasonable safety concern, such information could lead a reasonably careful officer to believe that a protective frisk should be conducted to protect his or her own safety and the safety of others… we limit our holding to circumstances where the information the officer possesses is reliable.

Id at 177. The Court went on to state that because the officer had reliable information that Collins had previously apparent access to a firearm, Collins's prior felony arrest and that this stop occurred at 4:00 a.m. gave the officer objectively reasonable grounds to be concerned for his safety and the frisk was permissible. *Id.*

In the present case Officer Makein, who was by himself on patrol, stopped Russell for a traffic infraction around 11 p.m. RP 7-10. Officer Makein contacted Russell in a well-lit parking lot of an AM/PM store. RP 26. Officer Makein was the only officer on the scene and there were no civilian witnesses in the vicinity. RP 9, 17, 46. Officer Makein recognized Russell from a prior stop that had just occurred eight days prior. RP 9. Due to the circumstances of the August 28, 2011 stop, Officer Makein was concerned for his safety. RP 16.

On August 28, 2011 Officer Makein was investigating a traffic stop with a female driver and Russell was a passenger in the vehicle. RP 10. During the encounter on August 28th Officer Makein asked Russell, "do you have any weapons on you, do you have a gun on, do you have a knife on you, do have anything that is going to hurt me[?] He said - - he looked at me - - directly at me and said, NO. And I asked again, Are you sure, and he still said, No, I don't have anything." RP 12. This stop was conducted after midnight and Officer Withrow arrived on the scene to assist Officer Makein. RP 13. Officer Withrow eventually frisked Russell and discovered a loaded, small .22 caliber pistol in Russell's right front

pants pocket. RP 13, 15, 34; Ex. 3, 4, 5. Officer Makein described the gun and its size:

> I mean, it's a very small, little weapon that can be - - you know, can be concealed, can be kept in the palm of your hand. You wouldn't even see it depending on how it's held. It's just a very small weapon. It's a deadly weapon basically. I mean, it's made - - it appears to be made for close range. It's not a long-range type of weapon by any means. It's an up-close-and-personal type of shot if that was going to happen.

RP 15. The gun contained two chambers and one was loaded with a round of ammunition at the time Officer Withrow removed the gun from Russell's pocket. RP 15-16; Ex. 4, 5.

The August 28th encounter with Russell was still fresh in Officer Makein's mind when he contacted Russell on September 5th. RP 16, 39-40. Officer Makein was particularly concerned because Russell had been untruthful when previously asked if he was carrying a weapon. The size and type of the weapon previously found on Russell, a small gun that was easily concealed, caused Officer Makein great concern for his safety. RP 17. Further, Officer Makein was alone and it was late at night when he contacted Russell. RP 17. Officer Makein decided that a frisk of Russell for weapons was necessary to ensure his safety. RP 17. Officer Makein patted Russell down and felt a hard boxy object in

Russell's pants pocket. RP 18. The item was approximately six inches long, four inches wide and an inch or two deep. RP 18. While Officer Makein acknowledged the case itself was not a gun, based on the size of the case it was big enough to contain a weapon similar to the one Russell had possessed eight days prior. RP 18. Officer Makein could not immediately eliminate the possible threat by his initial feel of the object. RP 18. Officer Makein requested and received permission from Russell to remove the object from Russell's pocket. RP 18. The object was a mini Maglite container. RP 18; Ex. 2. Officer Makein received consent from Russell to open the case. RP 19. Inside the container contained a syringe, with what was later identified as methamphetamine. RP 19-21; Ex. 1.

Officer Makein's decision to extend the traffic stop by conducting a frisk of the Russell was objectively reasonable given the facts and circumstances of this case. Officer Makein was alone, it was late and he had previously encountered Russell, just eight days prior, armed with an easily concealable loaded pistol. All facts that Officer Makein specifically articulated as the reason why he frisked Russell. The facts of this case are similar to those in *Collins,* and perhaps even better suited for a justified frisking of a

person for a weapon. In *Collins*, the defendant had been stopped two months earlier and while there was indication of a gun, none was found. Further in *Collins* there were two officers present on the scene but it was late at night in a poorly lit area. This Court should find, as the Supreme Court did in *Collins*, that Officer Makein's frisk of Russell for weapons was reasonable and reverse the trial court's ruling to the contrary. *See* CP 76.

B. OFFICER MAKEIN'S REMOVAL AND OPENING OF THE CASE WAS OBJECTIVELY REASONABLE AND JUSTIFIED TO ELIMINATE THE RISK TO THE OFFICER UNDER THE CIRCUMSTANCES OF THIS CASE.

An officer must not only have justification for a protective frisk, but also for the scope of the frisk. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). *Terry* requires the scope of the protective frisk be outer clothing and the discovery of weapons that may be used in such a manner to assault the officer. *Id.* If an officer conducting a protective frisk feels an object that he or she cannot discern the identity of and the object is consistent in density and size of an item that may or may not be a weapon, the officer is permitted to remove the object to examine it. *Id.* at 114.

> Once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent and any continuing search without probable cause

> becomes an unreasonable intrusion into the individual's private affairs.

Id., citing State v. Allen, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980) (internal quotations omitted). Further, it has been held that removing objects such as cigarette packs or other small containers to search for miniature weapons, such as razor blades or other small objects that could be used as a weapon is not reasonable. *State v. Horton*, 136 Wn. App. 29, 38, 146 P.3d 1227 (2006).

In *Horton* officers conducted a protective frisk on Horton and discovered an open cigarette pack in his jacket packet. *State v. Horton*, 136 Wn. App. at 33. The officer searched inside the cigarette package and found methamphetamine. *Id.* The State argued that the cigarette pack could contain small objects such as razor blades that could conceivably be used as a weapon against an officer. *Id.* at 37-38. The Court of Appeals rejected the State's argument. The court held that an officer may withdraw an object that feels like a weapon but once the object is removed and the officer sees the object is a cigarette pack and not a weapon, the justification for the intrusion ends. *Id.* at 38. The court stated, "[n]othing in the particular circumstances here suggested that Mr. Horton's weapon of choice was likely to be a razor blade or a paper clip." *Id.* The court also noted that the officer could have protected

himself against such miniature weapons by tossing the cigarette pack out of reach. *Id.*

In the case at hand, Russell was known to carry a loaded gun that could easily be concealed in the palm of one's hand, let alone the case that was removed from his pocket. *See* RP 13, 15, 34; Ex. 2, 3, 4, 5. Officer Makein stated he would not shake the case because if it contained a loaded gun, such as the one found on Russell eight days earlier, it would not be a good idea, presumably for safety reasons. RP 33. Officer Makein also clarified his earlier testimony stating that while he knew the case was not a weapon, he did not know if the case could contain a weapon, such as the one Russell had possessed eight days earlier, therefore the officer safety concern was not alleviated by simply removing the case from Russell's pocket. RP 18, 45.

Russell was being issued a traffic infraction for lane travel and not having a headlamp on his bike during hours of darkness. Once Officer Makein was finished issuing the citation Russell would be free to leave. It would be an unnecessary and unreasonable risk to Officer Makein's safety to not open the mini Maglite case he removed from Russell's pocket. First, given the size and character of the loaded gun taken off Russell eight days earlier, the case

could have easily contained a gun similar to the one discovered eight days prior. Second, perhaps one could argue while the case was in Officer Makein's possession his safety was not in danger, but Officer Makein would have had to hand the case back to Russell when he finished issuing Russell the citation. It is unreasonable under the facts and circumstances of this case to expect Officer Makein to hand Russell back the case, which could contain a loaded firearm, without first looking inside of it to ensure Officer Makein's safety as he terminates his contact with Russell. In this case, unlike *Horton*, Russell was known to carry a loaded firearm that could be concealed within the object removed from his clothing and therefore looking inside the case to make sure there was no weapon was justified. This Court should reverse the trial court's ruling that opening the container was unreasonable and unjustified. *See* CP 76.

C. OFFICER MAKEIN RECEIVED CONSENT FROM RUSSELL TO REMOVE THE CASE FROM RUSSELL'S POCKET AND OPEN THE CASE.

While the State firmly believes that Officer Makien's retrieval of the case and its opening was objectively reasonable and justified to eliminate any risk to the officer's safety, the State is also arguing that Russell consented to the retrieval of the case from his pocket

and consented Officer Makein's opening of the case. A person can consent to being searched by an officer. The State must show that the consent was voluntarily and freely given. *State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). The determination whether consent is voluntarily given is a question of fact. *State v. Reichenbach,* 153 Wn.2d 126, 132, 101 P.3d 80 (2004). The court must look at the totality of the circumstances. *State v. Reichenbach,* 153 Wn.2d at 132. The court may consider a number of factors when determining if consent was voluntary. *State v. O'Neill*, 148 Wn.2d at 588. These factors include, but are not limited to: the intelligence or degree of education of the person, were Miranda warnings given and was the person advised of the right to consent. *Id.* at 588. "While knowledge of the right to refuse consent is relevant, it is not a prerequisite to finding voluntary consent, however." *State v. Recichenbach*, 153 Wn.2d at 132 (citations omitted). The court may also weigh such factors as implied or express claims of police authority to search, a defendant's cooperation, an officer's deception as to identity or purpose and previous illegal actions of the police. *Id.*

In *Reichenbach*, Mr. Seaman had been in contact with police regarding his landlord forcing Mr. Seaman to drive the landlord to

go purchase drugs. *State v. Reichenbach*, 153 Wn.2d at 128-29. After numerous calls, a detective obtained a search warrant for the landlord, Reichenbach, and Mr. Seaman's car. *Id.* at 129. On that date, Mr. Seaman had called the detective to inform him that Reichenbach was again forcing Mr. Seaman to drive Reichenbach to a location so Reichenbach could purchase methamphetamine. *Id.* 128-29. Mr. Seaman did call the detective to inform him that Reichenbach was having difficulty obtaining methamphetamine and Mr. Seaman was unsure Reichenbach would be able to obtain the drugs. *Id.* at 129. The detective did not inform the court that Reichenbach was having difficulty obtaining methamphetamine. *Id.* Officers staged a car accident to block the road and contacted Mr. Seaman's car. *Id.* The officer's ordered Reichenbach out of the vehicle and searched the vehicle. *Id.* The officers discovered methamphetamine on the floor near where Reichenbach had been sitting.

The Court of Appeals held the search warrant obtained by detectives allowing them to search Mr. Seaman's car and Mr. Reichenbach was invalid. *Id.* 130-31. The Supreme Court in *Reichenbach* now looked to whether Mr. Seaman's consent would be sufficient to permit the officers to search the vehicle. *Id.* at 130-

31. The Court acknowledged that Mr. Seaman was cooperating with police, was not coerced and seemed of reasonable intelligence. *Id.* at 132-33. The Court found that Mr. Seaman had consented to a search of the entire vehicle. *Id.* at 133. The Court did find that Reichenbach was unlawfully seized when the officers ordered him out of the vehicle at gunpoint and it was at that time that Reichenback involuntarily abandoned the methamphetamine due to the police's unlawful actions. *Id.* at 135-37.

In *O'Neill*, the officer had O'Neill step out of the car after O'Neill gave a false name and told the officer his driver's license had been revoked. *State v. O'Neill*, 148 Wn.2d at 572. The officer saw what he believed was a spoon used for cooking drugs when O'Neill stepped out of the vehicle. *Id.* The officer asked O'Neill for consent to search the vehicle. *Id.* at 573. O'Neill refused and told the officer he would need to get a warrant to search the car. *Id.* at 573. The officer responded he did not need a warrant and could arrest O'Neill for the drug paraphernalia and search the vehicle incident to O'Neill's arrest. *Id.* The conversation went back and forth. *Id.* The officer continued to ask for consent. *Id.* O'Neill continued to refuse. *Id.* Eventually, O'Neill consented to the

search of the car. *Id.* The officer found drugs in the car. *Id.* The Supreme Court held that consent can be given while a person is detained. *Id.* at 589. However, under the circumstances in *O'Neill*, where a defendant refused consent and only acquiesced after continued pressure by the police, consent cannot be valid because it was not freely and voluntarily given. *Id.* at 589-91.

In the present case, Russell consented to having the case removed from his pocket and the officer's subsequent search of the case. The trial court found:

> Officer Makein then asked the Defendant if it was okay if he removed the case from the Defendant's pocket and search the case's contents. The Defendant gave voluntary consent to have the case removed from his pocket and searched.

CP 74, Finding of Fact 1.26.

Russell had prior interaction with law enforcement on August 28, 2011. RP 10. Russell's contact with Officer Makein on September 5, 2011 had been cooperative. RP 28. Officer Makein told Russell he was not free to leave and he was going to be frisked due to the previous contact Russell had with Officer Makein. RP 30. Russell was detained but not in handcuffs. RP 45. When Officer Makein frisked Russell he felt a box in Russell's pocket and asked, "What's this[?]" to which Russell responded it was a box.

RP 18. Officer Makein asked, "[d]o you mind if I take it out?" and Russell replied, "Okay." RP 18-19. Once the box, a Maglite case, was removed from Russell's pocket, Officer Makein asked Russell for consent to search the case, which Russell granted. RP 19.

The totality of the circumstances in this case clearly demonstrate that Russell consented to not only the removal of the case from his pocket but also Officer Makein's opening of the case. Unlike, *Reichenbach*, there was no illegal activity by Officer Makein that would invalidate Russell's consent. Also, unlike *O'Neill*, Russell did not object or say, "no" when Officer Makein asked if he could remove the case and search it. Officer Makein did not pressure Russell or threaten him with a warrant like the officer did in *O'Neill*. As the trial court found in its findings of fact, Russell consented to the removal and search of the case. This Court should find Russell's consent valid and voluntary and the evidence found inside of the case should not have been suppressed.

D. EVIDENCE THAT IS LAWFULLY OBTAINED MAY BE USED IN A CRIMINAL PROSECUTION AGAINST A DEFENDANT.

The plain view doctrine allows for warrantless searches in an area where there is a reasonable expectation to privacy when certain criteria are met. *State v. Goodin*, 67 Wn. App. 623, 627,

623 P.2d 135 (1992). The plain view doctrine requires that "an officer must: (1) have a prior justification of the intrusion; (2) inadvertently discover the incriminating evidence; and (3) immediately recognize the item as contraband." *State v. Goodin*, 67 Wn. App. at 627, *citing State v. Kennedy*, 107 Wn.2d 1, 13, 726 P.2d 445 (1986). Further, the United States Supreme Court has ruled that under the Fourth Amendment inadvertent discovery is no longer a requirement for the plain view exception and it "has never been explicitly required under Article I, section 7 of the Washington Constitution." *Id.* at 627-28, *citing Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

As argued above, the protective frisk of Russell, the subsequent removal of the case and opening of the case were objectively reasonable and justified for officer safety purposes. Therefore, when Officer Makein opened the case and saw the loaded syringe, which he immediately recognized the contraband, in plain view. RP 19-21; Ex. 1. Officer Makein had a prior justification for opening the case, officer safety, and Officer Makein was not looking for drugs, he was looking for a weapon, therefore the syringe containing methamphetamine was inadvertently found. The discovery of the methamphetamine clearly fits under the plain

view exception and the State should be able to use the lawfully obtained evidence in the criminal prosecution against Russell.

V. CONCLUSION

For the foregoing reasons, this court should reverse the trial court's ruling suppressing the evidence and remand the case back to the trial court for further proceedings.

RESPECTFULLY submitted this 25th day of April, 2012.

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LEWIS COUNTY PROSECUTOR

April 25, 2012 - 4:42 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 43034-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

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